No. SC85331

IN THE
SUPREME COURT OF MISSOURI

SURREY'S ON THE PLAZA, INC.,

Respondent/Cross-Appellant,

v.

DIRECTOR OF REVENUE,

Appellant/Cross-Respondent.

PETITION FOR JUDICIAL REVIEW
FROM THE MISSOURI ADMINISTRATIVE HEARING COMMISSION
THE HONORABLE CHRISTOPHER GRAHAM, COMMISSIONER

APPELLANT'S/CROSS-RESPONDENT'S INITIAL BRIEF

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JURISDICTIONAL STATEMENT

This case is a petition for judicial review from a decision of the Administrative Hearing Commission (AHC), rendered under § 621.050, RSMo 2000, finding that Respondent/Cross-Appellant, Surrey's on the Plaza, Inc. (Surrey's), was not liable for an assessment of unpaid sales tax issued by the Director of Revenue (the Director).[1]

Surrey's, which sold sightseeing rides in horse-drawn carriages, was assessed unpaid sales tax for its own operation and as a successor to the previous owner on the ground that it operated a place of amusement. Although the AHC determined that Surrey's was liable under § 144.150, RSMo 2000, as a successor for the previous owner's unpaid tax, it ultimately held that Surrey's was not liable for any of the assessments because it did not operate a place of amusement under § 144.020.1(2), RSMo Cum. Supp. 2002. This case, therefore, involves the construction of state revenue laws.

Jurisdiction is proper in this Court because this appeal involves the construction of one or more revenue laws of this state. Mo. Const. art. V, § 3; § 621.189, RSMo Cum. Supp. 2002.

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[1]Although Surrey's AHC complaint and the AHC's decision spell Surrey's without an apostrophe, documents prepared by the taxpayer and the Director include an apostrophe in the spelling (Exhibits A, D, and E). The Director has employed the latter spelling throughout this brief.

STATEMENT OF FACTS

Following an audit covering the period June 1, 1998, to June 30, 2001, the Director issued assessments for unpaid sales tax against Surrey's, both for its own operation and as a successor to the previous owner, on its sales of horse-drawn carriage rides in Kansas City's Country Club Plaza (the Plaza).[2] Surrey's filed a complaint with the AHC challenging the assessments.[3] Although the AHC determined that Surrey's was liable a successor, it ultimately held that Surrey's was not liable for any of the assessments because it did not operate a place of amusement.[4]

In 1982, MJ Surrey's Ltd. began operating a horse-drawn carriage-ride business in the Plaza.[5] Although it did not initially collect sales tax on its ride sales, the business registered with the State in 1992 following a sales tax audit and began filing returns and collecting tax on those sales.[6] In 1997, tax delinquencies forced the original owners to

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[2]L.F. 1-79, 86, 89; Tr. 17.

[3]L.F. 1-79, 83.

[4]L.F. 94, 97.

[5]L.F. 84; Ex. A.

[6]L.F. 84; Ex. A.

forfeit the business's assets to the IRS.[7] The stable that boarded its horses also filed liens against the business for outstanding stable fees.[8]

In May 1998, Ed Becker, president of Harbour Wholesale, Inc., paid the liens and purchased the business's assets, which included approximately twenty carriages, twenty-one horses, and a building located off the Plaza to store both.[9] Becker operated the business, which he called Surrey's on the Plaza, beginning in June 1998, but did not register with the state or collect sales tax on ride sales, because he believed those sales were not taxable.[10] Although ownership had changed, the business operated in essentially the same manner.[11]

Becker, like the previous owners, offered horse-drawn carriage rides through the Plaza, which lasted approximately thirty minutes and were tightly regulated by city

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[7]L.F. 84; Ex. A.

[8]Ex. A.

[9]L.F. 84; Tr. 42, 94-95, 117; Ex. A.

[10]L.F. 84-85; Tr. 12, 31; Ex. A. Surrey's competitor, however, remitted to the Director sales tax on its carriage-ride sales during the audit period. Tr. 82-84; Ex. A.

[11]Ex. A.

ordinances.[12] The city required that the rides begin and end in the same place, dictated the routes carriages could travel, prohibited operators from "cruising" for customers, and permitted the rides only for sightseeing, not transportation.[13] Detailed records concerning the number of rides sold and the hours the horses worked were also required.[14] During the audit period, Surrey's had approximately twenty individuals registered with the city as carriage drivers.[15]

Becker, who worked as a carriage driver, testified that the rides were educational, "entertaining," and that customers were "amused" by them.[16] He explained that while its competitors sold "rides," Surrey's sold "guided tours."[17] Surrey's also sold customers

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[12]L.F. 84-85, 87; Tr. 17, 21; Ex. A.

[13]L.F. 84-87; Tr. 17, 105-06; Ex. A.

[14]Tr. 44-45, 87, 154; Ex. A.

[15]Tr. 49, 66; Ex. A.

[16]L.F. 85; Tr. 103-05, 157, 160-61. Immediately after testifying before the AHC commissioner that his customers were "amused," Becker added, "amuse is not the word I want to use today." Tr. 161.

[17]Tr. 110.

gift certificates for carriage rides.[18]

On March 17, 2001, Becker entered into an agreement with Charles Allenbrand to sell Surrey's.[19] Allenbrand, who continued to operate the business under the name Surrey's on the Plaza, Inc., was Becker's "good friend" and had worked for Becker as a carriage driver.[20] Even after the sale, Surrey's submitted a power of attorney to the Director during the audit identifying Becker as a bookkeeper for the business.[21] Allenbrand, like Becker, did not register with the state or collect sales tax on ride sales.[22]

As part of the agreement, Becker sold Allenbrand approximately twenty horses and twenty-eight carriages.[23] Becker kept only one horse and carriage.[24] The agreement

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[18]Tr. 40, 159; Ex. C.

[19]L.F. 85; Tr. 14, 43, 85; Ex. D.

[20]L.F. 85; Tr. 101-02.

[21]Tr. 28; Ex. A.

[22]L.F. 85; Ex. A.

[23]L.F. 85; Tr. 178; Ex. D. The AHC found that sale included twenty-seven carriages, but the sales agreement lists twenty-eight carriages.

[24]L.F. 85; Tr. 177; Ex. D. The AHC found that Becker kept one carriage and two horses, but Becker testified that he kept only one of each. Tr. 177.

also contained a non-compete clause that prevented Becker from operating a carriage-ride business within five miles of the Plaza for five years.[25]

Following the audit, the Director issued assessments totaling $66,817.91 in sales tax and $16,536.76 in additions and interest against Surrey's both for its own operation and as a successor to Becker's business.[26] Surrey's filed a complaint with the AHC, which determined that Surrey's was liable as a successor, but reduced the potential liability on the assessment to $11,146.[27] The AHC ultimately decided, however, that Surrey's was not liable for any of the assessments, because it did not operate a "place of amusement."[28] Both the Director and Surrey's filed petitions for review from the AHC's decision.

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[25]L.F. 85; Ex. D.

[26]L.F. 89; Tr. 81; Ex. A.

[27]L.F. 83, 91-94, 98-99.

[28]L.F. 95-97, 99.

POINT RELIED ON

The AHC erred in determining that Surrey's was not liable for the Director's sales tax assessments, because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and these sales were taxable under the amusement tax (§ 144.020.1(6), RSMo) in that: 1) Surrey's operated a "place of amusement" by charging fees for sightseeing rides in horse-drawn carriages that it owned; and 2) Surrey's controlled the amusement activity occurring in its carriages by directing the manner and operation of its rides.

Fostaire Harbor, Inc. v. Director of Revenue, 679 S.W.2d 272 (Mo. banc 1984);

Lynn v. Director of Revenue, 689 S.W.2d 45 (Mo. banc 1985);

Branson Scenic Ry. v. Director of Revenue, 3 S.W.3d 788 (Mo. App. W.D. 1999);

J.B. Vending v. Director of Revenue, 54 S.W.3d 183 (Mo. banc 2001)

Section 144.010.1(10), RSMo 2000;

Section 144.020.1(2), RSMo 2000;

Section 144.021, RSMo 2000.

ARGUMENT

The AHC erred in determining that Surrey's was not liable for the Director's sales tax assessments, because this decision was unauthorized by law, not supported by competent and substantial evidence on the record as a whole, was contrary to the reasonable expectations of the General Assembly, and these sales were taxable under the amusement tax (§ 144.020.1(6), RSMo) in that: 1) Surrey's operated a "place of amusement" by charging fees for sightseeing rides in horse-drawn carriages that it owned; and 2) Surrey's controlled the amusement activity occurring in its carriages by directing the manner and operation of its rides.

Surrey's charged fees for sightseeing rides in horse-drawn carriages that it owned. The amusement tax applies to "fees paid to, or in any place of amusement." This Court has previously held that fees charged for sightseeing rides in helicopters and boats are taxable as fees paid in or to a place of amusement. Because Surrey's controlled the amusement activity it provided to its customers, it operated a place of amusement and its fees were taxable.

A. Standard of Review

The AHC's decision is upheld only when authorized by law, supported by competent and substantial evidence upon the record as a whole, and not clearly contrary to the reasonable expectations of the General Assembly. *See* Becker Elec. Co. v. Director

of Revenue, 749 S.W.2d 403, 405 (Mo. banc 1988); § 621.193, RSMo 2000. This Court owes no deference to the AHC's decisions on questions of law, which are matters for this Court's independent judgment. La-Z-Boy Chair Co. v. Director of Econ. Dev., 983 S.W.2d 523, 524-25 (Mo. banc 1999); Hewitt Well Drilling & Pump Serv. v. Director of Revenue, 847 S.W.2d 797, 797 (Mo. banc 1993).

B. The Amusement Tax.

State law authorizes a tax "upon all sellers for the privilege of engaging in the business of selling tangible personal property or rendering taxable service at retail in this state." *J.B. Vending v. Director of Revenue*,

54 S.W.3d 183 (Mo. banc 2001)åÅàÅøÖÅSection 144.020.1(2).

Authority to tax fees paid in or to places of amusement is also found in the statutory definition of "sale at retail." Sellers are required to pay sales tax on their gross receipts, which is "the aggregate amount of the sale price of all sales at retail." Section 144.021, RSMo 2000. The phrase "sale at retail," includes "[s]ales of admission tickets, cash admissions, charges and fees to or in places of amusement, entertainment and recreation, games and athletic events." Section 144.010.1(10), RSMo Cum. Supp. 2002.

This Court has held that the "simple general language" of the amusement tax "is not limited or qualified in any way." Blue Springs Bowl v. Spradling, 551 S.W.2d 596, 599 (Mo. banc 1977). "It applies to *all* such fees paid to or in" places of amusement. *Bally's Leman's Family Fun Centers, Inc. v. Director of Revenue*,

745 S.W.2d 683 (Mo. banc 1988)Section 144.020.1(2) "plainly provides for a sales tax to be imposed: (1) on sums paid for admission to places of amusement, etc.; (2) on amounts paid for seating accommodations therein; and (3) on *all* fees paid to, or in places of amusement, etc." L & R Distrib. Co. v. Missouri Dep't of Revenue, 648 S.W.2d 91, 95 (Mo. 1983) (emphasis in original). Consequently, to find a transaction taxable under the amusement tax only "two elements are essential,–that there be fees or charges and that they be paid *in or to* a place of amusement." L & R Distrib., Inc. v. Missouri Dep't of Revenue, 529 S.W.2d 375, 378 (Mo. 1975).

C. Surrey's Fees For Horse-Drawn Carriage Rides Were Taxable.

The amusement tax applies to the fees Surrey's charged for horse-drawn carriage rides under this Court's decisions in two similar cases. In these cases, one involving rides in a helicopter and the other in a boat, this Court held that taxpayers who charged fees for such sightseeing rides operate places of amusement and that these fees are taxable.

In Fostaire Harbor, Inc. v. Director of Revenue, 679 S.W.2d 272 (Mo. banc 1984), the taxpayer sold helicopter rides over St. Louis historic sites. The flights followed planned courses, lasted between five and twenty-five minutes, and began and ended in the same place, a barge moored in the Mississippi River. *Id.*

The taxpayer argued that the fees it charged for these flights were not taxable because the rides were for educational purposes, not entertainment. *Id.* at 273. Finally,

this Court held that "[h]elicopter flight tours come under a description of a place of amusement, and fees paid for such a tour are subject to sales tax." *Lynn v. Director of Revenue*,

689 S.W.2d 45 (Mo. banc 1985)*Id.* at 46. Passengers could also dine and dance during the ride, which began and ended in the same place. *Id.* at 48.

Just like the taxpayers in *Fostaire* and *Lynn*, Surrey's operates what the western district has called a "mobile place of amusement." Branson Scenic Ry. v. Director of Revenue, 3 S.W.3d 788, 792 (Mo. App. W.D. 1999) . But the AHC found that Surrey's fees for its horse-drawn carriage rides were not taxable because it operated no "place" of amusement. In other words, the AHC found that Surrey's operated in the Plaza and it controlled no building or locality in which it provided amusement activities.

The AHC, however, overlooked the fact that Surrey's owned the horse and carriage and controlled the operation of the ride. This is the same amount of control the taxpayers in *Fostaire* and *Lynn* had over their rides, yet this Court found that they operated places of amusement. In neither *Fostaire*, nor *Lynn*, did this Court require that the taxpayer control the skies over St. Louis or the Missouri River near Kansas City before finding that the taxpayers in those cases operated places of amusement. Moreover, the broad reach of the taxing statute coupled with the dictionary definition of the word "place" does not require that taxpayers who sell rides must control a specific building or piece of real property where the ride occurs as a prerequisite to finding a

place of amusement.

"Words used in statutes, absent statutory definition, are given their plain and ordinary meaning derived from the dictionary." Spudich v. Director of Revenue, 745 S.W.2d 677, 680 (Mo. banc 1988). The dictionary definition of the word "place" belies the AHC's contention that to be considered a place of amusement, Surrey's must control a building or piece of real property where the ride is given. While a "place" can be a definite location, such as a building or piece of real property, its definition encompasses much more than that. "Place" has been defined as "[a] portion of space; an area with definite or indefinite boundaries." American Heritage Dictionary 946 (2d. college ed. 1985). It has also been defined as a "space for one person to sit or stand, as a passenger or spectator." *Moon Shadow, Inc. v. Director of Revenue*,

945 S.W.2d 436 (Mo. banc 1997) *Id.* This Court held that the taxpayer did not operate a place of amusement because no amusement or recreational activities took place in its building, but rather on the river. *Id.* at 437. Moreover, this Court held that the river, which was owned and controlled mostly by the federal government, not the taxpayer, could also not be considered a place of amusement. *Id.*

The difference between *Moon Shadow* and this case is control over the amusement activity. In both *Fostaire* and *Lynn*, the taxpayer controlled the amusement activity and was in charge of all aspects of operating the ride. This remained true even though the rides operated beyond the taxpayers' facilities--a barge and a dock--and in areas--the sky

and a river--not owned or controlled by the taxpayer. Rather, the amusement activity occurred in a "place" that was owned and controlled by the taxpayer–a helicopter and a boat.

In *Moon Shadow*, on the other hand, the taxpayer did not control the amusement activity of floating on the Current River. The taxpayer merely rented inner tubes and transported customers to a put-in point on the river; it had no involvement in providing, much less controlling, the amusement activity. The customers, who floated on their own down the river, controlled the amusement activity without any involvement by the taxpayer.

Here, Surrey's just like the taxpayers in *Fostaire* and *Lynn*, controlled the amusement activity. Its customers rode in horse-drawn carriages owned and controlled by Surrey's. Although the route the carriage traveled may have been dictated by the city, Surrey's, not its customers, controlled the manner in which the carriage operated and the sightseeing tour that was provided. Surrey's customers, again like those in *Fostaire* and *Lynn*, began and ended their rides in the same place. Except for the mode of travel, this case is nearly identical to *Fostaire* and *Lynn*.

The AHC obviously understood this and its decision expressly states that this case would be controlled by *Fostaire* and *Lynn* if not for *Moon Shadow*. But it misapprehended this Court's holding in *Moon Shadow* in determining that Surrey's fees were not taxable. The AHC treated Moon Shadow as if that case had overruled both

Fostaire and *Lynn*. But the Court in Moon Shadow relied on *Fostaire* and *Lynn* in reaching its decision. In support of its statement that a place of amusement is "a building or locality used for a special purpose," this Court cited *Fostaire* and *Lynn* and identified the places of amusement in those cases as a helicopter and boat, respectively. *Id.* The Court in *Moon Shadow* neither expressly nor implicitly overruled either of these cases.

Moon Shadow might be controlling if Surrey's had simply rented a horse and carriage to its customers so that they could tour the Plaza on their own. That would divorce the taxpayer's control from the amusement activity, and control over the ride is crucial to finding that a taxpayer operates a place of amusement. But that did not occur here. Surrey's controlled the place in which the amusement activity occurred. Thus, it operated a place of amusement and its fees were taxable under this Court's decisions in Fostaire and Lynn.

CONCLUSION

The AHC erred in finding that Surrey's was not liable for the sales tax assessments because it did not operate a place of amusement. Its decision should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

(1) That the attached brief includes the information required under Rule 55.03 and complies with the limitations contained in Rule 84.06(b) in that it contains words, excluding the cover, the signature block, this certification, and any appendix, as determined by WordPerfect 9 software; and

(2) That the floppy disk, which contains a copy of this brief, filed with this Court has been scanned for viruses and is virus-free; and

(3) That a copy of this brief and a floppy disk containing this brief, were mailed, postage prepaid, on December 11, 2003, to:

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